

**No. SC83633**

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**IN THE MISSOURI SUPREME COURT**

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**FARMERS' ELECTRIC COOPERATIVE, INC.,**

**Respondent,**

**v.**

**MISSOURI DEPARTMENT OF CORRECTIONS,**

**Appellant.**

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**Appeal from the Circuit Court of Cole County, Missouri,  
The Honorable Thomas J. Brown, III, Circuit Judge**

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**SUBSTITUTE BRIEF OF APPELLANT  
MISSOURI DEPARTMENT OF CORRECTIONS**

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## **JURISDICTIONAL STATEMENT**

This is an appeal from a judgment on damages only after remand from this Court. *See Farmers' Elec. Coop., Inc. v. Missouri Dept. of Corrections*, 977 S.W.2d 266 (Mo. banc 1998) (holding Department of Corrections liable for breach of contract); § 512.020, RSMo, 2000. After the Missouri Court of Appeals, Western District, affirmed the judgment, this Court transferred the appeal. Therefore, this Court has jurisdiction. *See Mo. Const. art. V, § 10* (amended 1976); Rule 83.04.

## STATEMENT OF FACTS

In *See Farmers' Elec. Coop. Inc. v. Missouri Dept. of Corrections*, 977 S.W.2d 266, 267–68 (Mo. banc 1998). In 1994, Corrections signed a petition of annexation, requesting voluntary annexation of the tract of land into the City of Cameron. After voluntary annexation, the tract of land was within the City's limits. And in 1995, Corrections decided to build the Crossroads Correctional Center on the remaining part of the tract of land and to purchase electricity for Crossroads from the City. *See Farmers' Elec. Coop.*, 977 S.W.2d at 267–68. Corrections constructed Crossroads in 1995 and 1996. *See Farmers' Elec. Coop.*, 977 S.W.2d at 268. Crossroads became operational and began using electricity in 1997.

This Court held that the City was the lawful supplier of electricity to Crossroads, but that by agreeing to voluntary annexation, Corrections breached the contract's implied covenant of good faith and fair dealing. Consequently, this Court ordered the case remanded to determine Farmers' damages. *Ahunco, Inc. v. Westinghouse Credit Corp.*, 883 S.W.2d 910 (Mo.App., W.D.

1994) *Farmers' Elec. Coop. Inc. v. Missouri Dept. of Corrections*,

977 S.W.2d 266 (Mo. banc 1998)

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700 S.W.2d 838 (Mo. banc 1985)

*Union Elec. Co. v. Platte–Clay Elec. Coop., Inc.*,

814 S.W.2d 643 (Mo.App., W.D. 1991)

## **ARGUMENT**

**The trial court erred by awarding Farmers' Electric Cooperative, Inc. lost margins for 50 years of projected sales of electricity for the Crossroads Correctional Center from 1997 through 2046, rather than for 12 years from 1997 through 2008, because 1) the trial court misapplied the measure of damages for breach of contract, which is whatever net gain the non-breaching party would have made under the contract plus any direct and natural consequences of the breach, in that the contract could be terminated in 2008, and lost margins after 2008 are not the direct and natural consequence of the Department's breach because in the absence of breach, Farmers' would not have the exclusive right to provide electricity for Crossroads, and because 2) no substantial evidence supports recovery of lost margins after 2008 in that there is insufficient evidence of the amount of electricity Crossroads would use after 2008.**

### **A. Standard of review**

The standard of review of this court-tried contract case is enunciated in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). The trial court's judgment will be sustained unless it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. *See* *Gee v. Payne*, 939 S.W.2d 383, 385 (Mo.App., W.D. 1997).

## **B. Damages based on the contract alone can extend only until 2008**

Implicit in both the trial court's judgment and Farmers' calculation of damages is the assumption that the contract between Farmers' and Corrections lasts as long as Corrections has a prison on the tract of land in DeKalb County. But courts will construe a contract to impose an obligation in perpetuity only when its language "compels" that construction. *Preferred Physicians Mut. Management Group, Inc. v. Preferred Physicians Mut. Risk Retention Group, Inc.*, 961 S.W.2d 100, 103 (Mo.App., W.D. 1998). A contract that purports to be perpetual must be "adamantly clear" that perpetuity is the parties' intent. *Preferred Physicians*, 961 S.W.2d at 103.

In *Preferred Physicians*, the Court refused to declare an obligation to be perpetual even though the contract set up an initial term of five years ending on January 1, 1995, with a series of automatic five-year renewals unless both parties agreed to termination. The court held that damages should be determined only through December 31, 1994, and not beyond that date, because the automatic renewal provision, when reasonably construed, permitted either party to terminate the contract. *Farmers' Elec. Coop., Inc. v. Missouri Dept. of Corrections*, No. WD58434

(Mo.App., W.D. Mar. 6, 2001)(*see Gee v. Payne*, 939 S.W.2d at 385) – is "the value of the performance of the contract, that is, the injured party is entitled to the benefit of the bargain, that being whatever net gain he or she would have made under the contract."

*Inauen Packaging Equipment Corp. v. Integrated Indus. Servs., Inc.*, 970 S.W.2d 360, 268 (Mo.App., W.D. 1998). That value is not, of course, strictly limited to amounts that the contract requires to be paid. But it is not unlimited; the injured party may recover damages only for the direct and natural consequences of the breach. *See Ross v. Holton*, 640 S.W.2d 166, 173 (Mo.App., E.D. 1982). These are damages that “may fairly and reasonably be considered as naturally arising from a breach of contract, according to the usual course of things.” *Liberty Fin. Management Corp. v. Beneficial Data Processing Corp.*, 670 S.W.2d 40, 57 (Mo.App., E.D. 1984), citing *Hadley v. Baxendale*, 9 Exch. 341, 26 Eng. L. & Eq. 398 (1854).

The party seeking to recover “has the burden to show not only the breach, but that damages have in fact occurred as a direct and natural consequence thereof.” *Shaughnessy v. Mark Twain State Bank*, 715 S.W.2d 944, 949 (Mo.App., E.D. 1986) (affirming denial of alleged lost profits from increased value of lots if bank had not refused to disburse additional funds from on-demand line of credit to pay for installing electrical power lines). *See also Herbert & Brooner Constr. Co. v. Golden*, 499 S.W.2d 541, 550 (Mo.App., K.C.D. 1973) (no evidence payment of fee for and interest on extension of construction loan made necessary by failure to complete construction by contract date).

As discussed below, damages for 2008–2046 are not the result of the breach. Corrections beached by seeking voluntary annexation. Had Corrections not sought voluntary annexation, Farmers’ may or may not have had the exclusive right to provide electricity for Crossroads. Farmers’ showing is nothing more than a claim based on a

hypothetical state of facts.

**D. In the absence of breach, Farmers’ would not have the exclusive right to provide electricity for Crossroads after 2008**

If the Department had performed its covenant of good faith and fair dealing and not sought voluntary annexation, Farmers’ would be entitled to provide electricity for use at Crossroads only so long as the tract of land on which Crossroads was built remained in a rural area – *i.e.*, outside the area that the City of Cameron could legally serve. *See* §§ 394.020(3), 394.080.1(4), RSMo 2000; § 394.315, RSMo 2000 *Farmers’ Elec. Coop.*, 977 S.W.2d at 270–71. And they minimize the impact of another truism: that because Crossroads was built *after* annexation Crossroads was a “new structure” and Farmers’ was not be entitled to provide electricity for Crossroads.

The second point is evident from the statute governing the continuing right of a rural cooperative to provide electrical service:

Nothing in this section shall be construed to confer any right  
on a rural electric cooperative to serve new structures on a  
particular tract of land because it was serving an existing  
structure on that tract.

*Union Elec. Co. v. Platte–Clay Elec. Coop., Inc.*, 814 S.W.2d 643 (Mo.App., W.D.

1991)*Farmers' Elec.*, 977 S.W.2d at 270.

Focusing on the hypothetical scenario in which there was no annexation, the trial court and the court of appeals ignore an even more plausible scenario, one where the facts remain the same, but for the breach. In that scenario, Corrections does not seek voluntary annexation, involuntary annexation occurs, Crossroads is constructed after involuntary annexation, and Farmers' does not supply electricity to Crossroads after involuntary annexation. Under the statute, Farmers' would not have the exclusive right to provide electricity for the life of Crossroads. Instead, the City of Cameron would have the exclusive right to provide electricity for the life of Crossroads. *See* §§ 91.010, 91.025.2, RSMo 2000; *Missouri Pub. Serv. Co. v. Platte-Clay Elec. Coop., Inc.*, 700 S.W.2d 838, 841 (Mo. banc 1985). The court of appeals' conclusion is contrary to the competitive balance struck by the legislature between municipal and cooperative provision of electricity to consumers in this state — the public policy that permits a city to provide electricity to “new structures” on tracts of land previously served by a cooperative, but now annexed into a city.

The courts below misapplied the measure of damages. Lost margins after 2008 are not the direct and natural consequence of Corrections' breach. In the absence of breach, Farmers' would not have the exclusive right to provide electricity for Crossroads.

**E. Farmers' did not present evidence that it lost margins after 2008 to a degree of reasonable certainty**

Proof of lost profits must be shown by reasonable certainty. *Manor Square, Inc.*  
*v. Heartthrob of Kansas City, Inc.*, 854 S.W.2d 38 (Mo.App.,

W.D. 1993)*Coonis v. Rogers*, 429 S.W.2d 709 (Mo. 1968)